United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

UNITED STATES COURT OF APPEALS

For The District of Columbia

JOSEPH COLEMAN,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee,

644

Appeal From The United States District Court

For The District of Columbia

NO. 22316

BRIEF OF APPELLANT

OF COUNSEL:
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November 4, 1968

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POINTS ON APPEAL

I. The trial judge erred in ruling that the defendant's prior convictions were admissible for the purpose of impeachment.

II. The trial court erred in instructing the jury that they were permitted to infer from defendant's unexplained possession of recently stolen property that he was guilty of the crimes of housebreaking and larceny.

III. The trial court committed plain error by failing to instruct the jury to disregard prejudicial statements made by the Government prosecutor.

Pursuant to Local Rule 8(d), counsel for appellant hereby states that this case has not been before this court before.

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STATUTES INVOLVED

The provisions of Title 22-1801 and 22-2201, of the District of Columbia Code, 1961 as amended provide as follows:

Section 22-1801. Housebreaking.

> Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years.

Section 22-2201. Grand Larceny.

> Whoever shall feloniously take and carry away anything of value of the amount or value of $100 or upward, including things savoring of the realty, shall suffer imprisonment for not less than one nor more than ten years.

Title 22-1301 of the District of Columbia Code, 1961 as amended, provides as follows:

Section 22-1301. False pretenses.

> Whoever, by any false pretense, with intent to defraud, obtains from any person anything of value,

or procures the execution and delivery of any instrument of writing or conveyance of real or personal property or the signature of any person, as maker, indorser, or guarantor, to or upon any bond, bill, receipt, promissory note, draft, or check, or any other evidence of indebtedness, and whoever fraudulently sells, barters, or disposes of any bond, bill, receipt, promissory note, draft, or check, or other evidence of indebtedness, for value, knowing the same to be worthless, or knowing the signature of the maker, indorser, or guarantor thereof to have been obtained by any false pretense, shall, if the value of the property or the sum or value of the money or property so obtained, procured, sold, bartered, or disposed of is $100 or upward, be imprisoned not less than one year nor more than three years; or, if less than that sum, shall be fined not more than $200 or imprisoned for not more than one year, or both. Any person who obtains any lodging food or accommodation at an inn, boarding-house, or lodging-house, without paying therefor, with intent to defraud the proprietor or manager thereof, or who obtains credit at such an inn, boarding-house, or lodging-house by the use of any false pretense, or who, after obtaining credit or accommodation at such an inn, boarding-house, or lodging-house, absconds or surreptitiously removes his baggage therefrom without paying for his food, accommodation, or lodging, shall be deemed guilty of a misdemeanor, and upon conviction thereof in the District of Columbia Court of General Sessions be fined not more than $100 or imprisoned not more than six months, or both, in the discretion of said court.

The provisions of Title 14-305, of the D.C.C., 1961 as amended, reads as follows:

Section 14-305. Conviction of crime.

> A person is not incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime. The fact of conviction may be given in evidence to affect his credibility as a witness, either upon the cross-examination of the witness or by evidence aliunde; and the party cross-examining him is not bound by his answers as to such matters. To prove the conviction of crime the certificate, under seal, of the clerk of the court wherein proceedings containing the conviction were had, stating the fact of the conviction and for what cause, is sufficient. (emphasis added).

Federal Rules of Criminal Procedure, Rule 52(b), Title 18 U.S.C.A. provides as follows:

Rule 52. Harmless Error and Plain Error.

> (b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

OTHER AUTHORITY

STATUTES

JURISDICTIONAL STATEMENT

Appellant, Joseph Coleman, the defendant below in Criminal Case No. 1343-67, was convicted by a jury of violating Title 22-1801 (housebreaking) and Title 22-2201 (grand larceny) of the District of Columbia Code, 1961, as amended. Upon conviction and sentence entered by the District Court on February 23, 1968, an appeal was allowed without prepayment of costs. This court has jurisdiction pursuant to 28 U.S.C. §1291.

STATEMENT OF THE CASE

Appellant was indicted on two counts. The first count charged him with housebreaking and the second count charged him with grand larceny. (22 D.C.C. §§1801 and 2201). (TR. 4). Appellant was tried by a jury on both counts and was convicted. He was sentenced to four (4) to twelve (12) years.

The evidence at the trial revealed that the complainant, Samuel R. Pillow, left the city on the 18th of August, 1967, and locked his apartment. (TR. 8). When he returned on the 27th of August, he found a saxophone missing, along

with other items. (TR. 9). 1/

Mr. Pillow stated that he asked a friend, Victor H. Kryston, to check his mail and his apartment from time to time during his absence. (TR. 7-10).

Mr. Kryston said that he checked the Pillow apartment on the 20th of August and found everything to be in order. When he returned on the 21st of August, he found evidence of a breaking and entering. He also noticed that several items were missing. (TR. 75-76). Mr. Kryston then notified both the police and Mr. Pillow. (TR. 76-77).

On the 21st of August, a man identifying himself as Wilson Terry appeared at the Loan Department of Livingston & Co. and pawned a saxophone. 2/ (TR. 5-17).

Mr. Gordon, the pawnbroker, issued a pawn ticket 3/ in the name of Wilson Terry (TR. 16-17) for the saxophone, later identified as Mr. Pillow's. (TR. 9).

1/ Mr. Pillow admitted he knew nothing about how the saxophone was taken. (TR. 12).

2/ Government Exhibit 1

3/ Government Exhibit 2

Mr. Gordon testified that the defendant returned to Livingston & Co. on the 18th of September. (TR. 18). Mr. Gordon notified the police on that day. (TR. 18). After a search of the defendant, the police found the pawn ticket bearing the name of Wilson Terry in the defendant's possession. (TR. 18).

Although Mr. Gordon had no difficulty identifying the defendant as the man he saw in the pawnshop on the 18th of September, there was some doubt in his mind as to whether he could identify the defendant positively as the man who pawned the saxophone on the 21st of August. (TR. 21-25). Mr. Gordon first stated he wasn't sure that the defendant was the man who pawned the saxophone on the 21st of August. (TR. 25). A month had elapsed between the 21st of August and the 18th of September. (TR. 25-26).

The Government did not call the police officer to whom Gordon had stated his uncertainty as to defendant's appearance at the pawnshop on the 21st of August. (TR. 25, TR. 27-30, and TR. 33).

One of the arresting officers, Detective Mazur, testified that when he arrested the defendant he found other identification with the name "Wilson Terry" in the defendant's

wallet.. (TR. 31). 4/

The Government attempted to strengthen its identification of the defendant as the pawnor of the saxophone by introducing Wilson Terry, who testified that he had lost his Selective Service card 5/ (TR. 42), (which had been found in the defendant's possession (TR. 31)), and that the signature appearing on the pawn ticket was not his. (TR. 40-42).

The Government then introduced James T. Miller, a handwriting expert, who went into an elaborate dissertation on the subject of handwriting analysis, culminating in his identifying the defendant as the man who signed the pawn ticket "Wilson Terry" on the 21st of August. (TR. 43-72).

When the defendant sought an opportunity to testify in his own behalf, his counsel requested a ruling on the admissibility of his prior convictions under the Luck Doctrine. (TR. 86).

4/ Government Exhibit 4

5/ Government Exhibit 5

The trial judge in ruling that defendant's prior convictions were admissible for impeachment purposes under Gordon v. United States, stated: "...anything that has to do with cheating and stealing is admissible because Luck has been modified by Gordon." (TR. 86).

In view of the trial court's ruling, the defendant was not able to offer any explanation to the jury as to how he acquired possession of the saxophone in question.

The defendant did not testify.

The jury was charged that it could infer from the defendant's "unexplained" possession of recently stolen property that he committed both the alleged housebreaking and the alleged larceny. (TR. 105-106).

On the basis of the foregoing, the jury found the defendant guilty of both crimes charged in the indictment.

SUMMARY OF ARGUMENT

1. It is the contention of the appellant that the trial judge erred in his ruling on the admissibility of defendant's prior convictions, by abusing the discretion vested in him under Luck v. United States. 6/

The District Court judge failed to consider the criteria limiting admissibility of prior convictions, set forth in numerous decisions of this court. The following criteria were not considered by the trial judge:

1) The remoteness of defendant's prior convictions;

2) The similarity of defendant's prior convictions to the crime for which he was on trial;

3) The necessity for holding a hearing, out of the presence of the jury, to determine the importance of defendant's testimony and weigh this against the prejudicial effect of impeachment; and

4) The inadequacy of the evidence identifying the defendant.

6/ Luck v. United States, 121 U.S. App. D.C. 151, 348 F.2d 763, (1965).

The trial judge further failed to consider the critical importance of allowing the defendant to testify, in this type of case, free from a recital of his prior misdeeds. This court has repeatedly expressed the importance of an accused's testimony, where an instruction on the inference of possession of recently stolen property is permitted.

Finally, appellant contends that the lower court has the burden of making an inquiry on the record to show how its discretion was exercised in allowing the prior convictions, and failure to do so constituted plain error.

2. The appellant contends that it was error for the trial judge to instruct the jury on the inference arising from his unexplained possession of recently stolen property. Error was committed in three respects: First, the inference contemplates a situation where the defendant has an effective opportunity to take the stand and fails to do so, or a situation where the defendant has testified and the jury has disregarded his testimony. Second, the inference should be applied only in cases where the Government has other corroborating evidence and not where defendant's possession of stolen property is the only basis of the prosecution's case. Third, where such an

instruction is permitted, the court must instruct the jury that the defendant's failure to take the stand in his own defense is not an indication of his guilt.

3. Appellant contends that it was error for the trial court not to instruct the jury to disregard the prosecutor's prejudicial references to a fingerprint expert and to fingerprint testimony.

ARGUMENT

POINT ONE

Appellant contends that the trial court erred in its ruling on the admissibility of defendant's prior convictions. There are factors in this case which should have prompted the trial court to exclude defendant's prior convictions on the basis of the guidelines laid down by this court.

The Judge's Ruling:

When defense counsel sought to put the defendant on the stand, he asked the court for the benefit of the Luck Doctrine." 7/

7/ Luck v. United States, 121 U.S. App. D.C. 151, 348 f.2d 763, (1965).

The trial court ruled that "anything that has to do with cheating and stealing is admissible because Luck has been modified by Gordon." 8/ (TR. 86).

With regard to the defendant's specific convictions, he stated:

> "Then you have got a case of housebreaking and larceny in '59, this one that I am marking, that is admissible to impeach his credibility. And then you have got three false pretenses, which is cheating and which is admissible, I believe. And then you have another larceny case. So you have got three false pretenses, one grand larceny, and one housebreaking and larceny." (TR. 87).

Luck Doctrine:

In making this ruling, the trial judge abused the discretion vested in him. This court in Luck v. United States pointed out the inherent limitations to Title 14 D.C.C. §305, (1961), by stressing that the language of the statute is not mandatory.

> "The trial court is not required to allow impeachment by prior convictions everytime a defendant takes the stand in his own defense. The statute, in our view, leaves room for the operation of sound judicial discretion to play upon the circumstances as they unfold in a particular case. There may well be cases where the trial judge might think that the

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8/ Gordon v. United States, 127 U.S. App. D.C. 343, 383 F.2d 939, (1967).

> cause of truth would be helped more by letting the jury hear the defendant's story than by defendant's foregoing that opportunity because of fear of prejudice founded upon a prior conviction." (p. 760).

Limiting Criteria of Gordon and Other Cases:

The trial judge indicated that his ruling on the admissibility of defendant's prior convictions was based on Gordon v. United States, supra. (TR. 86). However, the trial court never addressed itself to any of the limiting criteria spelled out in Gordon.

The trial judge did not hold a hearing out of the presence of the jury to determine the value of the defendant's testimony as the court suggested in Gordon.

> "We recognize the undesireability of prolonging the trial unduly when the court is already confronted with requirements which work to that end, but in many cases the best way for the District Judge to evaluate the situation is to have the accused take the stand in a non-jury hearing and elicit his testimony and allow cross-examination before resolving the Luck issue. Not only the trial judge, but both counsel, would then be in a better position to make decisions concerning the impeachment issue." (p. 941).

Another of the limiting criteria of Gordon which the trial court failed to observe is the problem which arises when the prior convictions are for the same or

similar conduct for which the defendant is on trial.

The court in Gordon further warned:

> "A special and even more difficult problem arises when the prior conviction is for the same or substantially the same conduct for which the accused is on trial...As a general guide those convictions...should be admitted sparingly...." (p. 940).

In this case the judge ruled that the defendant's prior convictions for housebreaking and larceny were admissible.

Finally, this court pointed out in Gordon that even though it was true that both robbery and larceny reflect dishonest conduct and ostensibly prior convictions for such offenses do bear on the defendant's credibility, "the nearness or remoteness of the prior conviction, even one involving fraud or stealing...if it occurred long before...should be excluded on the ground of remoteness." (p. 940).

The defendant's conviction for housebreaking and larceny which occurred in 1959 -- some eight years before the trial in question -- should have been excluded on the ground of remoteness.

Similarly, the defendant's three convictions for false pretenses, a misdemeanor, in 1964, although involving

three different complainants, all arose out of events occurring on the same day, and were disposed of together. If the trial judge felt they were admissible, he should have limited admission to a single conviction for false pretenses.

It is appellant's contention that the better view is expressed in the Uniform Rules of Evidence, Rule 21:

> "...if the witness be the accused in a criminal proceeding, no evidence of his conviction of a crime shall be admitted for the sole purpose of injuring his credibility unless he has first introduced evidence admissible solely for the purpose of supporting his credibility...." 9/

In addition to the limitations spelled out in Gordon, this court has laid down certain other guidelines concerning the use of prior convictions for impeachment purposes since the Luck decision.

In Barber v. United States, ___ U.S. App. D.C. ___, 392 F.2d 517, (1968), this court held that where evidence

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9/ See also: ALI Model Code of Evidence (1942), Rule 106(3): "If an accused who testifies at the trial introduces no evidence for the sole purpose of supporting his credibility, no evidence concerning his commission of a crime shall, for the sole purpose of impairing his credibility be elicited on his cross-examination or be otherwise introduced against him...."

identifying the defendant left "much to be desired," it was error for the trial judge not to consider the Luck Doctrine. In the instant case, there were no witnesses to the crimes alleged. There was no eivdence placing the defendant at the Pillow apartment at the time of the alleged housebreaking. The evidence presented at trial showed only that a man, whom the pawnbroker originally thought resembled the defendant, pawned a saxophone, belonging to Pillow on August 21, 1967. The saxophone, was pawned in the name of Wilson Terry. 10/ The pawnbroker's identification of the defendant as the man who pawned the saxophone on that date was uncertain. (TR. 23-25).

Furthermore, the description the pawnbroker wrote on the back of the pawn ticket could have fit any number of people. The pawnbroker described the pawner as "... a colored male 26 years old, five foot eleven, 135 pounds ...." (TR. 21). Not only was this description vague, but it was not an accurate description of the defendant. (TR. 21). The prosecution later put on a handwriting expert who testified that the defendant had signed the ticket bearing

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10/ TR. 16-17.

the name of Wilson Terry. (TR. 43-72).

The testimony of the handwriting expert only identified the defendant as the man who signed the pawn ticket in the name of Wilson Terry. The fact that the defendant pawned the saxophone in someone else's name, in itself, is not a criminal act. (TR. 19-20). This testimony in no way explained how the defendant acquired the saxophone. The Government did not offer any proof to explain defendant's acquisition. There was no showing that the defendant was at that time, or any other time in possession of any of the other articles missing from the Pillow apartment.

From the foregoing, it is apparent that the lower court abused the discretion vested in it, by failing to follow the guidelines spelled out in this court's decisions.

Defendant's Testimony was Critical:

The instant case presents a further and even more demanding reason for excluding the prior convictions. In this case the defendant's testimony was crucial to his own defense, because the sole basis of his guilt on both counts was the inference the jury was permitted to draw

from his "unexplained" possession of the recently stolen property. Under the weight of the judge's ruling, it would have been highly prejudicial for the defendant to testify in his own behalf. Had the defendant been allowed to testify in his own behalf, free from fear of impeachment, he might have been able to explain his possession of the property in question.

Clearly, in this particular case, the probative value of the defendant's prior convictions was outweighed by the prejudice to him resulting from impeachment.

In Brown v. United States, 125 U.S. App. D.C., 220, 370 F.2d 242, (1966), this court held that the trial judge abused his discretion in ruling that the defendant's prior conviction for assault would be admissible if the defendant took the stand, because the defendant's conduct at the time of the offense was critical. In that case, the appellant was charged with assaulting a police officer with a dangerous weapon. Relying on the testimony of the officers and two other witnesses, the appellant's defense was that he was unconscious of his behavior at the time of the offense.

As in this case, the defense in the Brown case sought a ruling that the defendant's prior conviction was inadmis-

sible under Luck. The request was denied. The court in reversing noted: "Without doubt, reciting a defendant's prior criminal record to the jury can be highly prejudicial, especially where, as here the prior offense is a crime similar to the one on trial." (p. 243). See: Pinkney v. United States, 124 U.S. App. D.C. 209, 363 F.2d 696, (1966).

In Smith v. United States, 123 U.S. App. D.C. 259, 359 F.2d 243, (1966), this court affirmed defendant's conviction for unauthorized use of a motor vehicle but added:

> "Appellant did not take the witness stand to explain the possession contemplated by the instruction on recently stolen property. To the extent that this was a decision motivated by the fear of the impeaching effect of the prior convictions, appellant's alleged guilt of the crime immediately charged against him may have been largely fixed by his proven guilt of other and past crimes. This suggests that where inferences founded upon unexplained acts are likely to be heavily operative, the court's discretion to let the jury hear the accused's story, unaccompanied by a recital of his past misdeed, may play an important part in the achievement of justice...That discretion was not, however, invoked in this trial, which antedated Luck." (emphasis added, pp. 244-245).

In another case, Stevens v. United States, 125 U.S. App. D.C. 239, 370 F.2d 485, (1966), which occurred five months after Luck, the prosecution was allowed to elicit

eight crimes for which defendant had been convicted between 1935-1953. Judge Fahy in his dissent noted the following:

> "No discretion appears to have been exercised at appellant's trial, and it is clear that the evidence of numerous prior convictions had a prejudicial effect which outweighed its probative relevance...The failure of the trial counsel to rely upon our Luck decision to seek at least some limitation upon this type of evidence should not prevent our finding plain error affecting substantial rights in the failure of the court to apply the Luck decision." (p. 486).

This caveat, expressed in Smith, supra, was reaffirmed in Gordon -- the very case relied on by the trial judge:

"On the other hand, where an instruction relative to inferences arising from unexplained possession of recently stolen property is permissible, the importance of the defendant's testimony becomes more acute." 11/ (emphasis supplied).

Burden of The Trial Judge:

Although, it is true that the Luck decision contemplated that it was for the defendant to present to the trial court sufficient reasons for withholding past convictions from the jury in the face of a statute which

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11/ Gordon v. United States, Supra, p. 491, f.n. 11.

makes such convictions admissible, the obligation on the trial court to exercise discretion is not mitigated.

This court has recognized the obligation of the trial judge to exercise his discretion in accordance with the law of this jurisdiction. In Lewis v. United States, 127 U.S. App. D.C. 894, 381 F.2d 894, (1967), a case involving a conviction for second degree murder, this court pointed out that in the fair administration of justice, some obligation is placed upon the trial court and upon the prosecutor by the Luck decision relating to the admission of impeaching testimony.

> "The evidence as a whole...constrains us not to reverse for failure of the trial court to comply with Luck, but we add that in the fair administration of justice, some obligation is imposed by Luck upon the trial court and the prosecution, and the time may come when we shall not feel bound to ignore its principles merely because the defense does so." (p. 894). See also: Smith v. United States, supra; Stevens v. United States, supra; and Gordon v. United States, supra.

The defense in the instant case did raise the Luck issue. In failing to give the defendant an opportunity to show why judicial discretion should be exercised in his favor, the district court committed plain error. The trial judge, at no point, made an inquiry on the record to expound what rationale was behind his ruling.

It was the duty of the trial court in its fair administration of justice to raise the Luck issue sua sponte, and to determine concretely and for the record whether or not the probative value of defendant's prior convictions outweighed the potential prejudice to him in light of the permissible inference and the importance of defendant testifying in his own behalf. This duty is imposed on the trial judge, whether or not it is fully expounded by the defense.

POINT TWO

The defendant contends that the judge's instructions to the jury as to the inference which they were permitted to draw from his "unexplained" possession of recently stolen property was improper under the facts of this case.

The judge's ruling was improper for the following reasons:

1) The inference allowed to be drawn from defendant's "unexplained" possession of recently stolen goods, by necessity, contemplates that the defendant had an effective opportunity to explain his possession and that the jury has discredited his explanation -- not that there is a total absence of an explanation. At the very least, the

permission of the inference contemplates a situation where the defendant could have freely taken the stand but declined to do so, thus failing -- by his own volition -- to put before the jury another explanation of his possession.

2) The inference is permitted only in cases where the Government has other corroborating circumstances of defendant's connection with the alleged offenses. Here the only evidence against the defendant was his possession of the property.

3) In at least one case where such an instruction of inference was permitted, this court condoned that instruction on the ground that the judge had also instructed the jury that the defendant's failure to take the stand was not an indication of his guilt. No such instruction was given here.

Law In This Jurisdiction:

The law of this jurisdiction has been that unexplained possession of recently stolen property permits an inference that the possessor is the thief; if this is not rebutted or explained, it is sufficient to support a finding of guilt. See: Gilbert v. United States, 94 U.S. App. D.C.

32, 215 F.2d 334, (1954); Wright v. United States, 89 U.S. App. D.C. 70, 189 F.2d 669, (1951), Edwards v. United States, 78 U.S. App. D.C. 226, 139 F.2d 355, cert. denied, 1944, 321 U.S. 769, 64 S. Ct. 523, 88 L.ED. 1064.

Opportunity To Testify:

However, the law of this jurisdiction is, by necessity, based on the supposition that the defendant has had an opportunity to place his explanation before the jury and that they have rejected it. In the instant case, the trial judge's ruling on the admissibility of defendant's prior convictions made it impossible for him to take the stand. Therefore, the jury had no explanation before it which it could accept or reject.

Corroborating Evidence:

In cases where such an inference was held properly to have been permitted, the record shows that there was corroborating evidence.

In the case of McAbee v. United States, 111 U.S. App. D.C. 74, 294 F.2d 703, (1961), defendant's possession of recently stolen property was supplemented by cumulative evidence. In that case, defendant was on trial for six

separate thefts. Defendant had in his possession, property taken from the six different thefts in question. His fingerprints had been found on broken glass at one of the victim's homes, and he had been identified leaving the scene of one of the housebreakings in question.

In Edwards v. United States, 78 U.S. App. D.C. 226, 139 F.2d 365, (1943), the evidence showed that the crimes of housebreaking and larceny were committed in a store building by two men. The defendant was found in the company of another man who later confessed to his participation in the crimes. At the time they were found, they were each in possession of some of the recently stolen property. The court held that the inference was properly permitted here because the defendant was not only in "unexplained" possession of some of the property, but he was also found in the "unexplained" association of the other man who confessed to the crimes.

The necessity for corroborating evidence where an inference is permissible was recently confirmed in Flamery v. State, cert. denied, 35 L. Week 2519, (Del Sup. Ct. 1967). In affirming the defendant's conviction the court stated:

"If the only persons having control of, or access

> to, the stolen property are the defendant and his co-conspirators, joint possession of the stolen property may incriminate the defendant as well as his confederates. But before the corollary is applicable, however, there must be substantial evidence of the defendant's complicity in the offense, apart from the possession itself...." (emphasis supplied).

In the instant case there was no other cumulative evidence. There was no evidence placing the defendant at the Pillow apartment, there was no identification, there was no association, and there were no fingerprints. In fact, the only item -- of all the items taken from the Pillow apartment -- found in the defendant's possession was the saxophone. What about the other property that was taken?

Failure to Testify:

In at least one case in this jurisdiction, the inference was permitted on the basis that the trial judge had also instructed the jury that the failure of the defendant to take the stand was not an indication of his guilt.

In Bray v. United States, 113 U.S. App. D.C. 136, 306 F.2d 743, (1962), the defendant was found in the District of Columbia with an automobile which had been recently stolen from North Carolina. The jury was permitted

to draw the inference that the defendant was guilty of the charge of transporting a motor vehicle in interstate commerce with the knowledge that it had been stolen.

Appellant contended that the instruction erroneously placed the burden on him of explaining his possession. In upholding the judge's instruction, this court noted:

> "Moreover, immediately after explaining the inference based upon possession, the instruction went on to state that the jury should not infer guilt from appellant's failure to take the stand." (p. 748).

The trial judge in the instant case at no time instructed the jury that the defendant's failure to take the stand did not indicate he was guilty. (TR. 96-108). Thus, the jury could assume that the defendant, in fact, had no explanation to offer.

POINT THREE

Appellant contends that the prosecutor committed prejudicial error in referring to a fingerprint expert and to fingerprint testimony which did not exist. At two points during the trial the prosecutor referred to "fingerprint testimony" (TR. 6) and to a "fingerprint expert." (TR. 35). These references were highly prejudicial. The

The prosecuting attorney erroneously injected into the minds of the jurors the fact that there might be fingerprints associating or placing the defendant at the scene of the crime. In fact, the prosecutor had no fingerprint identification, and no fingerprint expert.

This court has,in the past, been very cautious in allowing the introduction of fingerprint evidence taken at the scene of a housebreaking. In two recent cases, Stevenson v. United States, Borum v. United States, 127 U.S. App. D.C. 43, 380 F.2d 590, (1967), and Borum v. United States, 127 U.S. App. D.C. 48, 380 F.2d 595, (1967), this court stressed the importance of scrutinizing such evidence. In the first case, Stevenson and Borum were found guilty of housebreaking and robbery, and the conviction was affirmed on appeal. In the second case, the Court of Appeals reversed Borum's conviction for housebreaking. In both cases, the Government's fingerprint evidence proved that at some time the defendant touched objects found at the scene of the crime. In the first case, however, the Government introduced additional evidence indicating that these objects were generally inaccessible to the defendants, and that therefore, the objects were probably touched during the commission of the crime.

In the second case, the Government failed to show that the objects bearing Borum's fingerprints were inaccessible to him. The Government failed to show either by direct, or substantial evidence that the defendant touched the objects bearing his fingerprints on the day of the housebreaking. This court 12/ stressed the importance of instructing the jury that the Government had the burden of proving beyond a reasonable doubt that the defendant touched the jars on the day of the housebreaking and in the course of the housebreaking.

On the basis of the precedents in this jurisdiction, it is clear that this court scrutinizes carefully fingerprint evidence when available.

In the instant case, no such evidence was available, and the suggestions by the prosecutor that such evidence existed was highly prejudicial to the defendant.

Prejudicial action by the prosecutor may violate the defendant's right of due process whether that action is innocent or not. See: Berger v. United States, 295 U.S. 78, 84, 88, 89; 55 S. Ct. 629, 79 L. Ed. 1314. In the Berger case, the Supreme Court stressed the necessity

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12/ P. 596, f.n. 7.

for the court to counteract misconduct by the prosecutor, either by declaring a mistrial or instructing the jury to disregard such conduct.

The duty upon the trial judge must be weighed against the strength of all the evidence in the case.13/ The necessity for an instruction to disregard the prosecutor's prejudicial statements becomes even more acute when the Government's case is so weak that the probability of prejudice to the accused is accentuated.

The trial judge, in this case, failed to instruct the jury that they should disregard these references to a fingerprint expert. He should have told the jurors to disregard these statements even though no objection was made by defense counsel.

Since the prosecutor represents not the ordinary individual, but the sovereignty, it is his obligation to insure that the trial is free from prejudicial comments. There is no sure way to determine how a jury views or interprets any particular statement. However, in this case, the evidence was so weak, that the judge

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13/ See: United States v. Carmel, 7th Cir, 267 F.2d 345, (1959); Crocklin v. United States, 5th Cir. 252 F.2d 561, (1958).

should have exercised his discretion by warning the jury to disregard the prosecutor's references. As Judge Fahy, in McAbee v. United States, 111 U.S. App. D.C. 74, 294 F.2d 703, (1961) stated:

> "The absence of objections in the context of the trial serves to emphasize, rather than alleviate, the failure of the trial to meet the requisite standard of fairness. Moreover, F.R. CRIM. P. 52(b), which has the force of law and has often been applied by this and other federal courts, provides:
>
> Plain error or defects affecting substantial rights may be noticed, although they were not brought to the attention of the court." (p. 708).

CONCLUSION

In view of the foregoing premises set forth herein appellant submits that the judgment of the lower court should be reversed.

Respectfully submitted,

Stephen L. Gelband
FISHER, SHARLITT & GELBAND
1522 K Street, N.W.
Washington, D.C. 20005

COUNSEL FOR APPELLANT

Polly Wirtzman
ASSOCIATE COUNSEL

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been served upon the United States Attorney, David Bress, and Assistant United States Attorney, Frank Q. Nebeker, this _____day of _____, 1968, by mailing copies thereof to them properly addressed with postage prepaid.

_____
Lois Hill

DATE:_____

DCB-EAT-SWR
1-27-69
(1)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOSEPH COLEMAN,
APPELLANT

v.

UNITED STATES OF AMERICA,
APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 22316

REPLY BRIEF OF APPELLANT

OF COUNSEL:
FISHER, SHARLITT & GELBAND
1522 K Street, N.W.
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January 16, 1969

STEPHEN L. GELBAND
POLLY WIRTZMAN
Fisher, Sharlitt & Gelband
1522 K Street, N.W.
Washington, D.C. 20005

COUNSEL FOR APPELLANT

TABLE OF CASES

REPLY BRIEF

The Government rests its case on the argument that defense counsel failed to meaningfully invoke the trial judge's discretion under Luck.[1/] In this connection, the Government points out that defense counsel failed to inform the trial court of (1) the theory and details of the defense; (2) the availability of other witnesses to present it; (3) the nature of defendant's proposed testimony; and (4) the need for the defendant to testify.

A reading of the trial transcript indicates that the trial judge not only supplied defendant's theory for him, but summarily prevented any further discussion on the details of defendant's theory or his testimony. (TR. 87).

> THE COURT:
>
> "You haven't made an opening statement yet, Mr. Brown, which you have got to do. What is your defense? He didn't do it and didn't go in there and didn't have it. That is all you can say.
>
> I have got to recess because I have to meet with Judge Sirica at 12:00 o'clock.
>
> So how long will you take for an opening statement, about five minutes?"

1/ Luck v. United States, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965).

The Government further contends that "it is clear from the record that the rationale followed by the District Judge rested on the distinction between crimes of violence and those which involve dishonesty." (Brief of Appellee, footnote 8). This is clearly a nonsequitor on the part of the Government. On the one hand appellee argues that the trial judge's discretion was never meaningfully invoked, and on the other hand that there is an on-the-record disposition of the Luck issue. If the record reflects the rationale of the trial judge, as appellee argues, we must assume that the judge's discretion was meaningfully invoked. If the trial judge's discretion was invoked, the next question to be answered is, whether the judge abused his discretion.[2/]

Appellant in his original brief filed November 4, 1968, argued that the trial judge abused the discretion vested

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2/ Appellee to support his contention that the trial judge made a meaningful exploration of pertinent criteria contends that the court prohibited the Government from using two weapons convictions. The record, however, does not make clear whether these were to be admitted or not. (TR. 87).

in him by the Luck decision and its progeny: (1) by failing to make a full and complete on-the-record inquiry of the issue; (2) by relying on only one aspect of Gordon.[3/] i.e., the distinction between crimes of violence and those which involve dishonesty; (3) by ignoring and failing to consider the other criteria spelled out in Gordon, i.e., (a) prior convictions which are for the same or similar conduct; (b) the nearness or remoteness of those prior convictions; (c) the special problem which arises in cases dealing with the inference to be drawn from defendant's possession of recently stolen property; and (d) the nature of the defendant's proposed testimony and the necessity for it. Appellant reaffirms that contention in this Reply Brief. If the trial judge considered any of these criteria or provided defense counsel with an opportunity to explore them, there is no evidence of it in the record.

The Government relies on two cases to support its contention that defense counsel in the instant case failed to meet his burden of persuading the trial court

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3/ Gordon v. United States, 127 U.S. App. D.C. 343, 383 F.2d 939 (1967), cert. denied, 390 U.S. 1029 (1968).

not to admit the prior convictions.4/ In relying on the Hood and Evans decisions, the Government has not only failed to distinguish these from the instant proceeding, but has also ignored subsequent decisions which place upon the trial court an obligation to make an on-the-record inquiry once the Luck issue is raised.

In Evans v. United States, decided in May, 1968, this court affirmed defendant's conviction saying:

> "It is clear that the District Judge afforded counsel abundant opportunity to present his contentions concerning the Luck issue."

However this court in so affirming pointed to the opportunity afforded counsel below and emphasized the fact that since the scope of discretion under Luck was new in this jurisdiction, it would in future cases require an on-the-record determination of that issue:

> "The development of the scope of Luck discretion and manner in which it is properly exercised has been recent in this jurisdiction...We should point out, as we did in Gordon, that considerations of the Luck claims must not be, as here, partly off the record...We have already noted that in

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4/ Hood v. United States, 125 U.S. App. D.C. 16, 365 F.2d 949 (1966). Evans and Philson v. United States, D.C. Cir. Nos. 20,480-81, decided May 8, 1968.

> the present case there was ample opportunity for counsel to present on the record, all his reasons for requesting the invocation of Luck discretion."

Judge Bazelon, dissenting, noted: "The trial court plainly did not understand the Luck doctrine, it made no attempt to comply with the procedural requirements for carefully exploring the testimony to be offered by appellant."

The trial court in the instant case certainly did not comply with the procedural requirements for exploring the testimony to be offered by the defendant. (TR. 87 supra). Since the trial court misconceived both Luck and Gordon and did not consider all the relevant factors, it could not have properly exercised its discretion.

Any question, however, that may have been left open by Evans, has been clarified by Jones v. United States, D.C. Cir., No. 21381, decided September 3, 1968. In Jones, the trial judge as here, did not question the defense as to the nature of appellant's proposed testimony, but ruled that defendant's prior conviction was admissible for impeachment purposes. As in this case, the Government in Jones contended that the defense's efforts were insufficient

under Hood and Evans. This court disagreed and reversed Jones' conviction for robbery, pointing out that:

> "Once the defendant has brought the issue (Luck), before the Judge, even though the burden of persuasion remains on the defendant, there is a duty upon the judge to make sufficient inquiry to inform himself of the relevant considerations." (emphasis added).

The opinion in Jones pointed out that perhaps the trial court didn't make an on-the-record inquiry because the need for appellant's testimony was obvious. Here, appellant claims the same obvious need existed. The only evidence the Government had to support the charges of housebreaking and larceny was the defendant's possession of recently stolen property.

In this regard, appellee has confused the issue by failing to distinguish the special problem which arises under Luck when an inference is involved. The Government's evidence against the defendant rested solely upon his possession of recently stolen property. Therefore, his testimony was extremely critical to the fair administration of justice.

The Government alleges that Smith v. United States, 123 U.S. App. D.C. 259, 359 F.2d 243 (1966) is cited incorrectly by appellant because that case rested on the underlying premise that the accused does not disclaim possession but has an explanation for it, and that this factor did not exist here. Since the defendant's theory, i.e., disclaimer, was supplied by the trial judge himself (TR. 87 supra), who effectively deprived the defendant of his right to testify by his ruling on Luck, the defendant had no other defense available to him. The only alternative available to counsel was to disclaim possession on the part of the defendant.

To further mitigate the importance of the special circumstance of this inference, the Government cites Covington v. United States, 125 U.S. App. D.C. 224, 370 F.2d 485 (1966). Covington is totally inapplicable here, since Luck was not invoked by the defense counsel in that case. This court in Smith warned that in cases where it is critical for the defendant to take the stand in his own behalf, he should not be forced to waive that right because of fear of impeachment by prior convictions.

The caveat of Smith was reaffirmed in Gordon:

> "Where an instruction relative to inferences arising from unexplained possession of recently stolen property is permissible, the importance of the defendant's testimony becomes more acute." (footnote 11).

The record in this case illustrates that the trial court did not attempt to comply with the procedural requirements for exploring the testimony to be offered by the defendant, nor did it explore any other limiting criteria. The court in failing to meet its independent responsibility to insure that Luck was properly applied, abused the discretion vested in it.

CONCLUSION

WHEREFORE, appellant submits that, for the reasons set forth herein and in his Brief filed November 4, 1968, the judgment of the lower court should be reversed.

Respectfully submitted,

Stephen L. Gelband
Counsel for Appellant

Polly Wirtzman
Associate Counsel

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been served upon the United States Attorney, David Bress, and Assistant United States Attorneys, Frank O. Nebeker and Robert S. Bennett, this 16th day of January, 1969, be mailing copies thereof properly addressed with postage prepaid.

Lois Hill

January 16, 1969

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,316

UNITED STATES OF AMERICA, APPELLEE

v.

JOSEPH COLEMAN, APPELLANT

Appeal from the United States District Court
for the District of Columbia

Cr. No. 1348-67

DAVID C. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
ROBERT S. BENNETT,
Assistant United States Attorneys.

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OTHER REFERENCES

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* Cases chiefly relied upon are marked by an asterisk.

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

I. Did the trial court err in ruling that the Government could impeach the appellant with certain prior convictions where

(1) defense counsel did not inform the court of the theory or details of the defense, the availability of other witnesses to present it, the proposed testimony of appellant, or the need to have appellant testify, but simply asked for the benefit of the *Luck* ruling because he did not want the appellant's criminal record spread before the jury, and
(2) the District Judge applied certain pertinent criteria in making his determination?

II. Should this Court find that it was reversible error for the trial court to instruct on the inference from the possession of recently stolen property where

(1) there was no objection below and this is raised for the first time on appeal, and
(2) the instruction was warranted by the evidence and was a correct statement of the law?

III. Should this Court find that it was reversible error for the prosecutor to refer to "fingerprint testimony" and "fingerprint expert" where

(1) there was no objection below and no motion for a mistrial or for a corrective instruction was requested, and
(2) it is clear from the record that when taken in context this was a slip of the tongue from which no reasonable juror could infer that the Government had fingerprint evidence?

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,316

UNITED STATES OF AMERICA, APPELLEE

v.

JOSEPH COLEMAN, APPELLANT

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In Criminal No. 1343-67 the Appellant Joseph Coleman was charged in a two-count indictment with the crimes of Housebreaking (22 D.C. Code § 1801) and Grand Larceny (22 D.C. Code § 2201). The trial commenced on January 18, 1968 before Chief Judge Edward M. Curran and a jury and terminated the following day upon the jury's verdict of guilty as charged. On February 23, 1968 the appellant was sentenced to a term of imprisonment of 4 to 12 years. This appeal followed.

The Trial

The evidence at trial showed the following:

Mr. Samuel R. Pillow who lived in the basement apartment at 1742 - 18th Street, Northwest, in the District of Columbia, left the city on August 18, 1967 and returned on August 27, 1967 (Tr. 8).

During his absence property valued at approximately $700.00 was taken from his apartment including a saxophone (Government Exhibit 1) bearing the serial number 539122 which was valued at approximately $175.00. Mr. Pillow testified that on the day he left the city his apartment was secured; that during his absence the apartment was not occupied;[1] that the saxophone was in the apartment when he left but not when he returned; that he did not know the appellant nor did he give him permission to enter his apartment; and that he did not give anyone, including the appellant, permission to take away any property from his apartment. (Tr. 8-11.)

Mr. Victor H. Kryston testified that during Mr. Pillow's absence he would go to the apartment to take care of the newspapers and the mail and to check things out. He went to the apartment on August 20th and "brought the mail in", "check[ed] the place out" and found "everything was fine." (Tr. 75.) On the following day, August 21, he again went to the apartment but on this occasion "[w]hen I got inside I could see that the side door appeared to have been forced open. There was some furniture out of place. It appeared to have been rummaged through, broken into." (Tr. 76.) Mr. Kryston called Mr. Pillow, conversed with him, and then "checked the apartment for some things which may have been taken." He discovered that the saxophone was missing. Mr. Kryston called the police. (Tr. 76-77.)

Mr. Ronald Gordon, employed as a loan department manager at Livingston and Company, located at 1421 H

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[1] A friend of Mr. Pillow's, Victor H. Kryston, had access to the apartment for the purpose of bringing in the newspapers and getting the mail (Tr. 10-12, 75).

Street, Northwest, testified that on August 21, 1967[2] the appellant representing himself to be a Wilson Terry pawned the saxophone, was issued a pawn ticket (Government Exhibit 2), and received a loan (Tr. 14-18). Mr. Gordon was positive as to his identification of appellant (Tr. 21). On September 18, 1967 Mr. Gordon saw the appellant a second time when he returned to the pawnshop (Tr. 18).

Mr. Victor Michael Goodman, employed as an appraiser at Livingston and Company, also identified the appellant as the individual who pawned the saxophone on August 21, 1967.[3] When he saw him again on September 18, 1967 he notified the police. (Tr. 78-80, 82.)

Plainclothesman James J. Mazur testified that he went to the pawnshop where the appellant was identified by the "pawnbroker". After conversing with Mr. Gordon and the appellant the latter was placed under arrest. Officer Mazur searched the appellant and took from him a wallet containing a pawn ticket[4] bearing the name of Wilson Terry and a social security card (Government Exhibit 4) bearing the name of Wilson F. Terry. (Tr. 29-31.)

Wilson F. Terry testified that the name Wilson Terry which was on the Livington and Company pawn ticket (Government Exhibit 2) was not written by him. Also, he testified that the social security card (Government Exhibit 4) bore his identification number but that the signature thereon was not his. (Tr. 40-42.)

Mr. James T. Miller, the Chief Questioned Document Analyst for the Metropolitan Police Department, was allowed to testify (without objection) as an expert witness. Mr. Miller testified that he compared the known

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[2] The same day the housebreaking and theft was discovered.

[3] The reliability of the identification of appellant is buttressed by the fact that the appearance of appellant was specifically noted and recorded (Tr. 81-82).

[4] This is not the Livingston and Company pawn ticket which is Government Exhibit 2.

handwriting specimens (Government Exhibit 5) of the appellant with the questioned writings[5] and that it was his opinion that the appellant signed the pawn ticket (Government Exhibit 2) and the social security card (Tr. 50, 74). Mr. Miller testified in detail on direct and cross-examination as to the reasons for his conclusions (Tr. 43-74).

At the close of the Government's case-in-chief counsel approached the bench at which time, out of the presence of the jury, trial counsel for appellant stated:

> MR. BROWN: I would like to put the defendant on the stand if I can have the benefit of the Luck decision. In other words, what I am interested in is not having his record spread before the jury. (Tr. 86.)[6]

Referring to the decision of this Court in *Gordon* v. *United States*[7] and making a distinction between crimes of violence and those which rest on dishonest conduct such as cheating and stealing, the District Judge determined that if the appellant took the stand his credibility could not be impeached with prior convictions for carrying a dangerous weapon and possession of a prohibited weapon but that he could be impeached with prior convictions for false pretenses (3), grand larceny (2), and housebreaking (1) (Tr. 86-87).

Following the Court's ruling, defense counsel made the following brief opening statement:

> MR. BROWN: If your Honor please, members of the jury, it is our contention that the defendant did not pawn the saxophone nor did he enter the house and take it out. (Tr. 88.)

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[5] The two questioned writings were the signatures on the pawn ticket (Government Exhibit 2) and the social security card (Government Exhibit 4) (Tr. 53).

[6] No other representations were made by defense counsel on the *Luck* issue.

[7] 127 U.S. App. D.C. 343, 383 F.2d 936 (1967), *cert. denied*, 390 U.S. 1029 (1968).

After this opening statement the Court recessed for lunch. Immediately after the court reconvened the defense rested (Tr. 88). The appellant did not take the stand, no witnesses testified on his behalf, and no defense evidence was presented.

After summations of counsel the court instructed the jury (Tr. 96-108). Trial counsel for appellant did not make any requests for instructions either before or after the charge and specifically expressed his satisfaction with the instructions given (Tr. 108). The jury took the case and returned a verdict of guilty as charged.

ARGUMENT

I. By failing to inform the trial court of the theory and details of his defense, the availability of other witnesses to present it, the nature of his proposed testimony, and the need for him to testify, the appellant failed to meaningfully invoke the court's discretion and accordingly this Court should not set aside the determination of the District Court which was made after some consideration of the pertinent criteria.

(Tr. 86-87, 88, 94-96)

The appellant argues that the trial judge abused the discretion vested in him under *Luck* v. *United States*, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965). Appellee submits that this claim is without merit because the appellant failed to meaningfully invoke the court's discretion.

No representation was made to the trial court as to what appellant's testimony would be, or why it was important that the court's discretion be exercised to immunize appellant from impeachment by prior criminal convictions. There was a complete failure on the part of appellant to inform the trial court of the theory and details of his defense and no information was provided the court as to the availability of other witnesses to present the defense. Also, there was not even the slightest suggestion that appellant had an explanation for his

possession of the saxophone which he would like the jury to consider.

In *Luck* this Court held that the statute allowing for the impeachment of an accused by prior convictions leaves with the trial judge room for the operation of a sound judicial discretion which can play upon the circumstances as they unfold in a particular case. Since *Luck*, this Court has made it clear that a defendant who does not invoke that discretion in a meaningful way cannot complain on appeal that there was an abuse of discretion. Even where the accused invokes *Luck* in the trial court, but initiates no meaningful discourse so as to engage the trial judge's discretion this Court has considered itself without warrant to set aside the trial judge's determination. *Hood* v. *United States*, 125 U.S. App. D.C. 16, 365 F.2d 949 (1966); *Evans and Philson* v. *United States*, —— U.S. App. D.C. ——, 397 F.2d 675 (1968); *Lewis* v. *United States*, D.C. Cir. No. 21,083, decided February 13, 1968 (unpublished opinion).[8] These cases we submit dis-

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[8] In *Lewis* the accused on March 21, 1967 went to trial on charges of robbery, assault with a dangerous weapon and carrying a dangerous weapon. After two witnesses for the defense testified, defense counsel informed the court that he planned to call the accused and requested a *Luck* ruling. Out of the presence of the jury, the prosecutor and defense counsel discussed the matter with the court. See Brief for Appellee at 11-13, filed in *Lewis* v. *United States*, *supra*. The discussion centered about the nature of the accused's criminal record. The defense however failed to inform the court of the details of the defense, the availability of other witnesses to present it, the specifics of his proposed testimony, and the need for him to testify. The District Judge ruled that if the accused took the stand the Government could impeach him with his prior record. Lewis took the stand and was subsequently impeached with 6 prior robbery convictions and one prior conviction for assault with intent to commit robbery. These convictions were 14 years old. On appeal it was contended that the trial court failed to consider enough criteria to sustain the exercise of discretion. In rejecting Lewis' claim, this Court noted that the "defense counsel contented himself with a bare invocation of *Luck* as an adequate reason in itself for exclusion of the prior criminal record. . . ."

We submit that in the instant case the defense counsel did less and the trial judge did more than their respective counterparts in *Lewis*. The contention of appellant that the "trial judge, at no

pose of the *Luck* issue raised on this appeal. In *Hood* the appellant asked for a ruling on the use of a prior conviction and referred to *Luck*. As in this case, no representation was made to the trial court as to what the accused's testimony would be, or way it was important that the court's discretion should be exercised to prohibit introduction of a prior conviction. The Court, speaking through Judge McGowan who authored *Luck*, wrote (125 U.S. App. D.C. at 18, 365 F.2d at 951):

> Defense counsel simply asked for a ruling and referred to *Luck*. On this kind of a record, we are not prepared to find that there has been an abuse by the trial court of the discretion which we have held to be reposed in it. If *Luck* made anything clear, it was that the defense is ill-advised to content itself simply with citing *Luck*. That case establishes only that Congress, in legislating to the effect that prior convictions may be used to impeach, left some room for the play of judicial discretion over the unfolding circumstances of the immediate trial. The alert and experienced trial judge presiding over a criminal case has a grasp of how the interests of justice are best served in the case taking shape before him. He may conclude that the defendant's story should be heard by the jury; and *Luck* gives him some flexibility in this regard. But *Luck* is the beginning of the discretionary process, not its end. And where, as here, the defense treats it as the latter, we are without warrant in the record for setting the trial judge's determination at naught. There was not in this instance what could be regarded as a meaningful invocation of judicial discretion; and we are not disposed in such case to find abuse.

Luck did not put the burden on the Government or the court to search out reasons to exclude from the jury

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point, made an inquiry on the record to expound what rationale was behind his ruling" (Brief for appellant at 18) is misleading. It is clear from the record that the rationale followed by the District Judge rested on the distinction between crimes of violence and those which involve dishonesty (Tr. 86-87).

evidence which bears on credibility. As was noted by this Court in *Gordon* (127 U.S. App. D.C. at 346, 383 F.2d at 939):

> *Luck* also contemplated that it was for the defendant to present to the trial court sufficient reasons for withholding past convictions from the jury in the face of a statute which makes such convictions admissible. *See* Hood v. United States, *supra*. The underlying assumption was that prior convictions would ordinarily be admissible unless this burden is met. "The trial court is not *required* to allow impeachment by prior conviction every time a defendant takes the stand in his own defense."

In *Evans and Philson*, *supra*, this Court noted that:

> Congress has determined that a defendant who wishes to testify may be so impeached. 14 D.C. Code § 305 (1967). All *Luck* and its progeny have done is point to the discretion in the district judge to exclude some or all prior convictions in some cases, when good reason is shown. This Court will not find abuse of that discretion unless the defendant has presented cogent reasons calling for his unimpeached testimony. (397 F.2d at 679).

There is, we think, a good practical reason for placing on the defendant the burden of invoking the judge's discretion in a meaningful way; that is the burden of coming forward with information vital to an informed ruling.[9] If the rule were otherwise, it would permit a defendant to invoke the court's discretion, withhold information necessary for an intelligent ruling, and later argue that he was denied the informed ruling to which he claims he was entitled. A ruling which countenances such strategy does not in our view aid the search for truth. Moreover, logic would seem to suggest that the more relevant the prior conviction is to the issue of

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[9] Judges Bazelon and Fahy have indicated that *Luck* may impose some obligation on the court and prosecutor. See *Lewis* v. *United States*, 127 U.S. App. D.C. 115, 381 F.2d 894 (1967).

credibility, the greater the burden should be on appellant to present reasons as to why he should be immunized from its impeaching effect.

Appellant contends that had he "been allowed to testify in his own behalf, free from fear of impeachment, he might have been able to explain his possession of the property in question." (Brief for Appellant at 15). No representation was made to the trial court that the accused had an explanation for his possession of the saxophone. Had such a proffer been made the District Judge might have ruled differently on the *Luck* issue. Moreover, it is clear from the opening (Tr. 88) and closing (Tr. 94-96) statements that the accused's position was that he was not the person who pawned the saxophone (Tr. 88).[10] Since appellant did not take the position below that he had an innocent explanation for his possession of the saxophone he should not be allowed to suggest such a defense on this appeal.

Appellee is aware that this Court has suggested that in a given case it may be appropriate where a defendant is fighting an inference from the possession of recently stolen property to allow him to testify without prior conviction impeachment. *Smith* v. *United States*, 123 U.S. App. D.C. 259, 260, 359 F.2d 243, 244 (1966). The underlying premise of *Smith* however is that the accused does not disclaim possession but has an explanation for it. This factor is absent in this case. In *Covington* v. *United States*, 125 U.S. App. D.C. 224, 370 F.2d 246 (1966) the

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[10] It is clear from the final summation of defense counsel that the thrust of the defense was that the appellant was not the person who pawned the saxophone and who signed the pawn ticket. In fact he stated "[s]o therefore it resolves down to the proof as to who signed this pawn ticket, whether it was Mr. Coleman or someone else." (Tr. 95). Appellee submits that on this issue the Government's cases was unusually strong since two eyewitnesses, each of whom had seen appellant on two separate occasions, positively identified him as the person who pawned the saxophone. Moreover, any doubt as to the identity of appellant should have been dispelled by the testimony of the expert witness Miller that appellant signed the pawn ticket. It is doubtful that appellant could have overcome the total weight of this testimony had he testified.

accused argued on appeal that it was improper for the Government to both impeach with prior convictions and have an instruction on the inference from recently stolen property. This Court in affirming the conviction refused to find plain error because there was no invocation of *Luck* by defense counsel. If appellant had an explanation for his possession of the saxophone—information peculiarly within his possession—he should not be allowed to withhold this vital information from the trial judge and then claim an abuse of discretion on appeal.

Finally, it should be noted that in spite of the failure of the defense to meaningfully invoke the *Luck* issue, the trial court did consider certain pertinent criteria (Tr. 86-87) and did prohibit the Government from using two weapons convictions which the trial judge apparently felt had little bearing on credibility.

II. The appellant's contentions that a) the court's instruction on the inference from the possession of recently stolen property was improper and b) that there was prejudicial prosecutorial comment, are frivolous.

(Tr. 6, 35, 106)

a) Appellant contends for the first time on appeal that it was error to give the instruction on the inference from the possession of recently stolen property. Appellant claims (1) that such an instruction is only appropriate in a situation where the defendant has an opportunity to explain his possession and does so or where he could have freely taken the stand but declines to do so, (2) the inference is permitted only where the Government has other corroborating circumstances of a defendant's connection with the alleged offense and (3) the instruction is appropriate only where the court also instructs on the right of a defendant not to take the stand. At the outset it should be noted that none of these claims were raised below, there was no objection to the instruction given on the inference from the possession of recently stolen property, and there was no request for an instruction on the

failure of a defendant to take the stand. These claims should not be considered for the first time on this appeal. See Rules 30, 52 of the Federal Rules of Criminal Procedure.

Moreover, appellee submits that appellant had the opportunity to take the stand but decided not to do so. Also, appellant's claims rest on the premise that he had an explanation for his possession of the stolen property, a fact not supported by the record. As has been already pointed out, if he had an explanation—a fact peculiarly within his knowledge—he should have informed the court. With such information the trial judge may have ruled differently on the *Luck* issue.

Appellee submits that an examination of the case law reveals no authority for the view that the challenged instruction can only be given where the Government has evidence other than possession connecting a defendant with the crime. In addition to the fact that appellant had possession of the recently stolen property, the Government showed that when he pawned it he used the name of another person. This additional factor undoubtedly had an effect on the jury's determination as to whether or not they should draw a guilty inference from the appellant's possession of the saxophone. Where as here the Government shows the possession of recently stolen property by the appellant we are entitled to the instruction [11] on the inference that may be drawn therefrom. *Wood* v. *United States*, 120 U.S. App. D.C. 163, 344 F.2d 548 (1965).

b) Appellant contends for the first time on appeal that the prosecutor committed prejudicial error in referring to "fingerprint testimony" (Tr. 6) and to a "fingerprint expert" (Tr. 35). Appellee submits that the claim should not be considered for the first time on appeal.

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[11] The instruction given (Tr. 106) was a correct statement of the law. See Junior Bar Section of D.C. BAR ASS'N CRIMINAL JURY INSTRUCTIONS § 75 and cases cited.

It must be noted that no objection was made at trial, no request for a mistrial was made and there was no request for a corrective instruction. This being the case there is no basis for reversal. See *Harris* v. *United States*, —— U.S. App. D.C. ——, 402 F.2d 656 (1968). We submit that the failure of defense counsel to object or to move for a mistrial or a corrective instruction is due to the fact that these brief references were in no way prejudicial to appellant. When read in context it is clear that these references were a mere slip of the tongue and in no way could the jury have inferred therefrom that the Government had fingerprint evidence. When read in context it is obvious that the prosecutor meant to say "handwriting testimony" and "handwriting expert."

CONCLUSION

WHEREFORE, appellee respectfully requests that the judgment of the District Court be affirmed.

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